



COVER SHEET

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**ASSOCIATIONS INCORPORATION AND
OTHER LEGISLATION AMENDMENT BILL 2006**

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Background

Prior to the enactment of the *Associations Incorporation Act* (1981) (Qld) ("the Act"), Queensland nonprofit organisations were formed as unincorporated associations, charitable trusts, organisations having letters patent, royal charters or creatures of private statutes. In the mid-seventies there was a dramatic rise in the formation of small unincorporated community organisations across Australia. The unincorporated association structure is generally regarded as useful for very small informal groups and very large membership organisations.¹ The lack of a corporate persona brings contractual, tort, and property holding legal inconveniences to those in between these polar extremes. A string of legal claims against the management committees of unincorporated associations during the mid-seventies, some of them involving members of the Queensland Parliament, caused the Queensland Law Reform Commission to consider the appropriateness of legislation providing incorporation for associations.² The Commission's Report submitted that,

"...the adoption of legislation of a general character which will in effect make it possible for various unincorporated associations to gain recognition as legal entities by some process of registration or formalisation allowing such bodies to obtain legal status, will remove in a satisfactory way these uncertainties for those associations which do obtain legal status."³

Further, the Minister in introducing the Associations Incorporation Bill to Parliament stated:

"The whole purpose of the Bill is to allow small associations that want to incorporate to do it as inexpensively as possible instead of having to revert to the Companies Act to obtain the full benefit of incorporation."⁴

About 20,000 nonprofit organisations have taken advantage of the legislation to gain corporate status and avoid some of the legal perils of unincorporated associations.⁵ The number of incorporated associations has been boosted by government funders and licensing agencies requiring nonprofit bodies to be incorporated. A rising awareness of committee member's personal liability popularised by the National Safety Council case⁶ has also promoted the general public's perception of the benefits of limited liability through incorporation.

Although the Act was designed to serve the needs of small community organisations, many incorporated associations have grown into enterprises of importance to the State's economy. For example, on the revenue side, gambling income accounts for 11.2% of Queensland's tax revenue of which 66% is attributable to poker machines.⁷ There are 573 clubs with 22,024 gaming machines in Queensland contributing to a projected \$582m in tax revenue for 2006-07. About 70% percent of the top fifty gaming machine clubs are incorporated associations, unlike some other states that require all gaming clubs to be companies limited by guarantee.⁸ On the expense side, a third of the current and capital expenditure of the Queensland government in 2006-07 will go to nonprofit organisations. As there are more incorporated

1 Small associations do not usually have great exposure to tort liability, contractual or property issues and when coupled with incorporation cost, these factors weigh significantly against incorporation. Large membership associations such as religious groups and political parties can afford the legal mechanisms to overcome these legal problems, gain maximum privacy and exclusion of judicial scrutiny.

2 Queensland Law Reform Commission, Report on the Law Reform Commission on a Draft Associations Incorporation Act, Report No. 30, 1979.

3 Ibid at p 9.

4 Queensland Parliament, Hansard, 18 August, 1981 at p 1642.

5 For the problems of unincorporated associations refer, R. Baxt, "The Dilemma of Unincorporated Associations", 1973, 47 ALJ 305 and K Fletcher, *The Law Relating to Non-profit Associations in Australia and New Zealand*, The Law Book Company Limited, Sydney, 1986.

6 *Commonwealth Bank of Australia v Friedrich* (1991) ACSR 115; refer also AS Sievers, "What is the Future for Honorary Directors and Committee Members? - Their Duties and Liabilities", in *Legal Issues for Non-profit Associations*, ed M McGregor-Lowndes, K. Fletcher & AS Sievers, LBC Information Services, Sydney, 1996; M McGregor-Lowndes, "Non-profit Corporations - Reflections on Australia's Largest Non-profit Insolvency", 1995, 5:4 AJCL 417.

7 Queensland State Budget, Budget Strategy and Outlook 2006-07 available at <<http://www.treasury.qld.gov.au>>

8 Queensland Gaming Commission Annual Report 2005-06, available at <<http://www.qogr.qld.gov.au/about-us/queensland-gaming-commission/qld-gaming-commission.shtml>>

associations in Queensland than any other nonprofit corporate form,⁹ it is economically important for the State that the enabling regulatory infrastructure of incorporated associations is maintained in good order.

The Act was last extensively amended in 1995.¹⁰ Subsequently, the Queensland Department of Equity and Fair Trading's *Annual Report* of 1998-99 announced a review of the Incorporated Associations Act,¹¹ that commenced in 2003. A community consultation report was released in February 2005.¹² During this period the Government released a report on the insurance crisis which recommended a review of the types and levels of insurance mandated for nonprofit organisations.¹³ Finally, on 28 November 2006, the *Associations Incorporation and Other Legislation Amendment Bill 2006* was introduced into Parliament and addressed some of the issues identified by the 2005 community consultation report.

The Bill contains two significant reforms for incorporated associations being:

- changes to mandatory public liability insurance, and
- relaxation of compulsory annual audit provisions for small associations.

There are a number of minor measures included in the Bill, most of which clarify ambiguities in the Act. Other issues identified in the community consultation report are being considered for a later Bill.

Annual reporting

Currently, the Act requires all associations, regardless of size to submit professionally audited financial statements.¹⁴ This has been an impost on small associations as audit fees have risen combined with a decline in the availability of persons willing to serve as auditors, particularly in regional Queensland. Clearly, a proportionate regulatory response was appropriate, particularly in the case of small associations where monthly members' meetings vet all inward and outward correspondence and pass for payment presented invoices. Theoretically an audit serves the members where there is a separation of member and management control. In many small associations this separation is non-existent or minimal.

The Bill introduces a 'tiered reporting' system, which has three levels based on total revenue or assets.

- *Level 1 associations* are those with at least total revenue or current assets of more than \$100,000. They will continue to be fully audited as per current requirements.
- *Level 2 associations* are those which do not fall into either Level 1 or Level 3. They will not be required to provide fully audited statements, but must instead have a registered accountant confirm that the books of the association have been kept in a manner consistent with good accounting practice.
- *Level 3 associations* are those with total revenue of \$20,000 or less and current assets of \$20,000 or less. These associations will only be required to lodge a statement by the association's president or treasurer, that they have kept accurate books of account.

However, the Bill requires associations that are statutorily bound to produce audited accounts under the *Collections Act* (1966), *Gaming Machine Act* (1991) or pursuant to the terms of

9 Queensland State Budget, Budget Strategy and Outlook 2006-07 available at <<http://www.treasury.qld.gov.au>>

10 *Associations Incorporation Amendment Act 1995*.

11 Department of Equity and Fair Trading, *Annual Report*, 1998-99, p 15.

12 Office of Fair Trading, *Review of the Associations Incorporation Act 1981 Consultation Paper*, February, 2005 available at <<http://www.fairtrading.qld.gov.au/oft>>

13 Queensland Government, *Report Liability Insurance Taskforce*, 2002, Brisbane, Recommendation.

14 Section 59, *Associations Act Incorporation Act 1981*.

funding or grant agreements with the government to be subject to full auditing requirements whatever their annual total revenue of current assets.

Determining current assets and total revenue

Current assets “means the assets held by the association as at the end date of the association’s last financial year, other than real property or assets capable of depreciation, and includes amounts held in financial institutions, stocks and debentures.”¹⁵ In terms of the QUT Standard Chart of Accounts (SCoA) for Queensland Nonprofit Organisations, current assets include for example, cash at bank, accounts receivable, inventory, short term investments and prepayments.¹⁶ It should be noted that the definition of current assets in this legislation is different from that provided by the accounting standards. The accounting standards differentiate between current and noncurrent assets primarily on the basis of the time frame within which benefits are expected to become available or be used.

The total revenue “means the association’s total income during the last financial year from all the association’s activities before any expenses, including the cost to the association of goods sold by the association, are deducted.”¹⁷ Once again in terms of the SCoA, total revenue includes grants received, donations received and contributions received (including members’ contributions) as well as revenue received from trading or operating activities.

The new audit provisions will only apply to associations if the association’s financial year end occurs after the commencement of the Act.¹⁸ For example, if the new amendments commence on the 1 July 2007 and the association’s year end is 30 June 2007, then the new audit provisions will apply in the next financial period (1 July 2007 – 30 June 2008).

A person approved by the Office of Fair Trading to audit an incorporated association, even though they do not hold a qualification specified in the Act, will continue to hold that approval once the new provisions commence.¹⁹

The Regulations to the Act will require attention in order to accommodate the new tiered reporting regime. The Regulation’s prescribed matters to be contained in an association with its ‘own rules’ and the model rules in Schedule 4 will require alteration to reflect that not all associations will have to appoint auditors and receive audited reports at their AGMs. This will be suitable for associations that incorporate after the Bill has commenced. However, there may be problems for associations already existing at the time of the commencement.

Nearly all associations will find that there will be a potential conflict between their current rules and the new tiered reporting provisions. The various versions of the model rules all require the association to appoint auditors and present their reports. The same is prescribed for ‘own rule’ associations. In any case, section 47 of the Act may well imply such provisions into an ‘own rule’ association that is silent on the matter and has not specifically excluded the model rules filling any gaps. For associations wishing to take advantage of level 2 and 3 relaxations, they should examine their rules and decide what rule changes are required. The Bill is couched in non mandatory terms and an association need only take up the relaxations if their members wish to do so. Thus the Bill will not override what is already in ‘own’ or model rules.

It needs to be understood that model rules of incorporated associations are the rules at the time of their incorporation and do not automatically update when the Regulations are amended to include a new set of model rules. This is a suggested reform that has not been taken up in the current Bill.

15 Clause 18

16 This is a standardised chart of accounts now being widely adopted by Queensland Government Departments and their funded organisations. Refer <https://olt.qut.edu.au/bus/DYO/index.cfm?fa=displayPage&rNum=1856978>

17 Clause 18

18 Clause 37

19 Clause 37

Existing associations that wish to take up the relaxation, be they either model rule associations or 'own' rule associations, will have to amend their rules through the general meeting of members and have them registered with the Office of Fair Trading. To implement the new relaxed audit provisions without doing so would breach the rules of the association, as the Act does not allow these provisions to override existing rules, either 'own' or model.

Public Liability Insurance

The Bill proposes to remove the current mandatory public liability insurance requirement of incorporated associations. At present section 70(1) requires that:

"the members of the management committee must ensure the incorporated association takes out insurance in respect of damage to property, death or bodily injury occurring upon the property of the incorporated association for a cover of at least \$1,100,000 and shall keep such insurance cover current at all times."

Neither the Queensland Law Reform Commission nor the Parliamentary record on the introduction of the initial Act discuss the policy reasons for the provision which appears to be similar to the initial New South Wales legislation. Public liability insurance adoption is usually externally driven by either landlords insisting on such insurance in lease agreements or contracts/funding agreements with the government which invariably insist on such insurance. Also some industry statutes mandate such insurance, for example, community housing and disability legislation.

There have always been concerns about this provision. The insurance hard market in 2002-03 with its higher priced premiums and hard to access coverage brought these issues to a head. First, it was not clear what was "the property of the association." If an association had a mere agreement in place to use a public hall or sports ground, rather than a formal freehold title or lease, was this property of the association? The law would construct this relationship often as a licence. A licence is a lesser legal right than exclusive possession of freehold title or a lease. A contractual licence is not regarded as a proprietary interest in land, merely a contractual relationship. However, it is not always easy to distinguish between a lease and a licence – even for experienced lawyers.²⁰

Second, it was not clear who might be liable, the management committee, association or no one, if the management committee failed to take out appropriate insurance. The Act only specifies a fine of individual management committee members for default. This leads to the next issue.

Third, the enforcement of the provision is difficult for the Department as there is no specific provision requiring disclosure of a policy of non-renewal or currency of insurance cover in the annual return.

Fourth, the amount of insurance specified was not commercially realistic. Public liability insurance is offered normally in \$5m increments and with some providers \$10m is the minimum. Recent government legislative provisions require \$10m cover.²¹ In any case, the nature of the insurance apart from the amount is unspecified. A policy may not be accessible if the insurer fails (e.g. HIH or an unauthorised foreign insurer) or the terms of the policy are restrictive in nature or contain extensive exclusions. During the recent insurance hard market, unauthorised foreign insurers who targeted nonprofit organisations flourished in the area of community centres and groups associated with the leisure industry, such as amusement parks and horse riding establishments.²² The size of such operations appears to be significant and in a case taken by ASIC against one of these insurers, the evidence

20 Tadgell J described the distinction as 'elusive' in *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174 at 179 and the Explanatory Note at p 24 concedes the distinction may depend "on a case by case examination of the facts as they arise".

21 An example is the Disability Services Act 2006 Regulation s 27.

22 *ASIC v Triton Underwriting Insurance Agency* [2003] NSWSC 1145 at para 6.

disclosed suggested that the company had written more than 10,000 policies.²³ At any rate, the amount insured is only one of the important issues that should be considered. Public liability insurance is not regulated as is compulsory third party motor vehicle insurance with standard terms and conditions. Consideration needs to be given to the scope of injuries to be compensated and the nature of any exclusions such as certain activities or particular categories of persons.

Fifth, the provision is 'one size fits' all without any ability for the Department or the Minister to tailor its application to exceptional individual circumstances or the fluctuating insurance market. There are alternatives to public liability insurance which can be equally or more effective in some circumstances. The consequences of the risk might be financed by another body (indemnity) or transferred. This inflexible approach also does not allow innovation in dealing with risk in a hard insurance market through, for example, large deductible thresholds, fixed benefit policies (such as are common for sporting or school accidents), or mutual risk pools.²⁴

This 'one size fits all' policy does not appear to be evidence based. Are incorporated associations magnets for public liability claims? How many public liability incidents occur in a year, what is their quantum and what causes and injuries were involved? Are some incorporated association activities more productive of civil liability claims than others? How does this group of organisations compare with small business, big business, independent contractors, other industries, and local, state or federal government? Does the result warrant special regulation which imposes costs and inflexible measures which focus on post facto events rather than the cause? The insurance crisis exposed a lack of statistics to inform policy decisions. The Queensland Government's Insurance Taskforce Report recommended that:

"the Government provide assistance to community groups and small business in gathering information on claims data."²⁵

and

"The Taskforce recommends that the Government examines ways that accurate and reliable information on litigation rates can be obtained."²⁶

If these recommendations had been actioned, government could have acted on evidence, rather than impressions and anecdotal stories to craft a more appropriate policy. The *Civil Law (Wrongs) Act 2002* requires insurance companies to provide public liability claims data to the government and an annual report on the matter is made a matter of public record in Parliament.²⁷ The lack of data on public liability litigation hampered the policy making during the insurance crisis where it was believed that there was an explosion of litigation leading up to 2002. When an evidenced based national trend study was finally completed, it revealed that litigation rates did not in fact rise in the period.²⁸

Finally, in terms of keeping members and the public safe from harm, an insurance policy does little as it merely compensates some of the loss after the event. It does not prevent harm. A more positive policy direction is to focus and promote risk management strategies of which public liability insurance may only be a part. The best social policy outcome is to encourage all concerned to exercise intentional risk management. The Government has recognised this

23 ASIC v Triton Underwriting Insurance Agency [2003] NSWSC 1145 at para 18.

24 For example, many larger organisations during the insurance crisis negotiated affordable insurance policy by accepting the first million of any one claim; another strategy was capped payouts for various injuries such as \$500 for a broken arm whether the actual loss was more or less than the stated payout.

25 Queensland Government, *Report Liability Insurance Taskforce*, 2002, Brisbane, Recommendation 10.

26 Queensland Government, *Report Liability Insurance Taskforce*, 2002, Brisbane, Recommendation 19.

27 Part 15.2, *Civil Law (Wrongs) Act 2002* (ACT).

28 EW Wright, national Trends in Personal Injury Litigation: Before and After "IPP", Justice Policy Research Centre, University of Newcastle, 26 May 2006.

principle in its own risk management arrangements²⁹ and its 2002 Liability Insurance Taskforce Report.³⁰

The so called 'insurance crisis' in recent years with rising premiums and limited availability of product magnified the inappropriateness of the provision, particularly for small associations. All other States with mandatory insurance provisions for incorporated associations have removed this burden on associations. In February 2002, the Queensland Government Insurance Taskforce recommended:

"that current legal requirements regarding the need for not-for-profit organisations to hold specific types and levels of public liability insurance be reviewed."³¹

Anecdotal evidence suggests that while many associations managed to source and pay for public liability insurance, some reduced vital community services to pay the increased premium; others either closed operations, operated in breach of the provision,³² or sourced 'dubious' foreign insurance company policies which had doubtful claims enforcement as mentioned above.

The Queensland Government's response has been to move away from the requirement of mandatory insurance except for those incorporated associations that own or lease property. Further, non-property associations must take a series of steps in considering the need for the association to take out such insurance. If insurance is not taken out then notice must be given to members, intending members and external parties that may have an interest in knowing about the lack of insurance. As will be discussed below, it is anticipated that most associations will continue to have public liability insurance, but this probably would have been the situation in any case, as the experience of other Australian states indicates. However, the nature of the measures will add to the existing practical problems and uncertainties of the previous provisions, create further regulatory compliance costs for incorporated associations with little ability to offset social benefits and its enforcement will be problematic for the Office of Fair Trading.

The following section first examines incorporated associations that will still be required by the Act to have public liability insurance. It then turns to those associations that are not required to have public liability insurance and the steps they are required to take in relation to such matters.

Mandatory Public Liability Insurance Provisions

Mandatory insurance is retained for particular types of incorporated associations, but the amount of cover is to be determined by the management committee. The types of associations that are required to take out public liability insurance are those that are:

- owners of land;
- lessees of land; or
- trustees of trust land under the *Land Act 1994*.³³

The announced policy behind retaining mandatory insurance for land owners and lessees is that:

"[t]hese associations are generally larger associations which would be more likely to take out public liability insurance as a result of conducting a risk assessment of the need for such cover."³⁴

29 Queensland Treasury, *Guidelines on Risk Management and Insurance*. Queensland Treasury, 1994, Brisbane.

30 Queensland Government, *Report Liability Insurance Taskforce*, 2002, Brisbane.

31 Queensland Government, *Report Liability Insurance Taskforce*, 2002, Brisbane, Recommendation 15.

32 Queensland Council of Social Services, (2001) *The Cost of Community Service – Insurance Survey 2001*, Brisbane.

33 Clause 25.

34 Explanatory Notes at p 3.

If land owning or leasing associations are likely to take out the insurance, either voluntarily or at the instance of a landlord, then why legislate for it with all the regulatory costs of enforcement for the Department and compliance cost for the association? If the same logic was to be applied, why not mandate public liability insurance for business land owners and lessees?

The announced policy for including incorporated associations that are 'trustees of trust land under the *Land Act 1994*' is more complex. The Explanatory Notes to the Bill states:

"Under the Land Act 1994 some associations hold land on trust, on the basis that the association has public liability insurance. The mandatory public liability insurance requirement has therefore been retained in respect of such associations because this requirement was key to the basis upon which the land was granted."³⁵

As will be further explained below, these arrangements involve public purpose land such as reserves or deeds of grant in trust (DOGIT) which are used for indigenous or community purposes such as cemeteries, heritage reserves, parks, halls, showgrounds and sport and recreation reserves. Neither the Explanatory Notes to the *Land Act 1994* nor the Minister's second reading speech introducing the Land Bill reveal such a basis for the granting of deeds in trust.

Section 92 of the *Land Act 1994* does excuse a trustee from any 'civil liability' and transfers the liability to the State Government, but section 92(3) does not apply to incorporated bodies such as a company limited by guarantee or an incorporated association. In any case, given the trustee might be a company limited by guarantee and the State has no ability to legislate mandatory insurance for these organisations, the inconsistency of treatment of entities is perplexing.

Definition of an Owner of Land

Section 36 of the Queensland *Acts Interpretation Act 1954* defines land for the purpose of Queensland statutes in terms of "messuages, tenements and hereditaments, corporeal or incorporeal". A working translation of these medieval terms is:

Messuages – a house including gardens, courtyards, orchards and other buildings;

Tenements – a property held for a tenure of years;

Hereditament – land held which on the owner's death is passed to his or her heirs;

corporeal– refers to whether the property is tangible, for example earth;

incorporeal- intangible, for example, a right to pass over the land (an easement).

Land is capable of horizontal, vertical and three-dimensional subdivision into stratum so it will include not only a playing field, but the right to pass over someone's land to gain entry to the playing field and a club house situated on the top floor of an apartment block overlooking the field.

An owner is a person or entity that has exclusive *right* of possession of the land and right to sell the land.³⁶ In Queensland, owners of land usually have a certificate of title registered in the Queensland Titles Office. In most cases, it should not be too difficult to determine whether an association is the owner of land.

³⁵ Explanatory Notes at p 24.

³⁶ Note that it is the 'right' to possess, not necessary actual possession.

Definition of a Lessee of Land

The definition of land discussed above will also apply in respect to a lease. Section 36 of the *Queensland Acts Interpretation Act 1954* defines a lease as including a “demise, tenancy and sublease, whether for a term, for a period or at will”, and a lessee as including a ‘tenant’. A ‘lessee’ in this context will be an incorporated association that has a grant of a right of exclusive possession of the land. Exclusive possession is the general right of a lessee to use and exclude others from the land (apart from statutory or contractual exceptions such as an inspection by the owner or authorised police entry).

The lease may be for a term of time (day, month or years) or just until some event occurs in the future. There need not be a formal written agreement for a lease to exist.

As mentioned above, if an association has a mere agreement to meet in a public hall or sports ground, rather than a formal freehold title or lease, then the law often constructs this relationship as a ‘licence’. A licence is a lesser legal right than exclusive possession of freehold title or a lease. A gratuitous licence could be mere permission by the owner of land for an association to play a sport on the land. A contractual licence may be a licence to access land in exchange for money to attend a sporting event. A licensee has a mere personal privilege to be on the land, not the right to exclude others from the land. At best a licence is based in contract and not a property right such as a lease.

However, it is not always easy to distinguish between a lease and a licence – even for experienced lawyers.³⁷ The Explanatory Note concedes the distinction may depend “on a case by case examination of the facts as they arise” and it may be difficult to distinguish a licence from a lease in some situations.³⁸ However, the Bill does make it clear that licenses will not trigger the mandatory insurance provisions.

If an association transfers its land or leases to another entity, for example, a trust or company limited by guarantee, and then negotiates a mere licence to use the property, it will avoid the mandatory insurance provisions. This is because it is no longer the owner or lessee of the land. However, if the new property holding entity is closely controlled by the incorporated association, it may in reality enjoy the same access and use of the property. It would be unfortunate if this structure was widely adopted as the policy behind the Bill would be thwarted.

Definition of a Trustee of Trust Land under the Land Act 1994

The Queensland government along with other Australian governments has a legislative framework in place regarding public land and that this land should not be alienated or pass out of the ultimate ownership and control of the State. Examples of such land are parks, reserves, buffer zones, natural resource management and environmental protection areas, boat ramps, public toilets, drainage areas, cemeteries, coastal protection reserves, sporting and recreational facilities and aboriginal community areas.

Under this framework, the State can appoint a trustee to manage the land, but at all times that State remains the ultimate owner, so that it is not possible for the trustee to transfer ownership of the land. The trustee has certain rights and responsibilities in respect of the land which are specified in the trust deed and legislative provisions. The trustee may be a natural person, a corporate body such as an incorporated association or company limited by guarantee, a government department or statutory authority. A common example is DOGITs which apply to many indigenous communities in Queensland.

Incorporated associations which are trustees in such situations will be in little doubt that they come within the Bill’s definition.

³⁷ Tadgell J described the distinction as “elusive” in *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174 at 179.

³⁸ The Explanatory Note at p 24.

Management Committee responsibilities

If the incorporated association is an owner, lessee or trustee of land, then the management committee is required to take out public liability insurance and keep it current. The amount is to be decided by the management committee. There is no specification is given as to the nature of the public liability insurance such as scope or exclusions. For example, a commonly used public liability policy during the insurance crisis by sporting clubs excluded from the policy 'player to player' injuries, professional advice and liability in a car park where a parking fee has been paid.³⁹ One has to question the social benefit of such limited policies.

The Bill does not clarify what consequences flow from a failure to abide by the proposed section apart from an offence against the Act being committed by each defaulting management committee member. Further, it does not clarify the management committee members' personal liability to an injured party if the insurance is not in place.

General Public Liability Insurance Provisions

New obligations imposed on the management committee require it to report its decision about public liability insurance to members at the first AGM of the association and at each subsequent AGM.

If the management committee decides that there is no need to take out public liability insurance, then it must give its reasons at the AGM and

“advise the members that the failure to take out public liability insurance means that the association's assets would be at risk if there were a successful claim against the association.”⁴⁰

The decision is to be made on the basis of 'need' not merely expense, value for money or availability of public liability insurance. Insurance is generally defined as “a contract where one party, the insurer, undertakes in return for a consideration, the premium, to pay the other, the insured, a sum of money in the event of the happening of a, or one of various, specified uncertain events.”⁴¹ Public liability insurance is a class of insurance in which the sum becomes payable when legal liability is incurred, as for personal injuries or professional negligence to another.

On the face of it, the 'need' decision might be made on an assessment of the likelihood of the association attracting legal liability and the ability of the association to satisfy a claim for damages. The need will vary with the activities undertaken by the association such as a hang gliding club for the elderly to an association that merely conducts a cyber chat room on hang gliding matters. On the plain meaning of the provision it is suggested that a management committee may believe the association 'needs' public liability insurance and this need will still exist even though the management committee knows that the association does not have enough money to pay the premiums or cannot find an insurer that will insure them.

If the Bill required the decision to be made within a risk management framework, then a better outcome may result. In a risk management context, once a risk is established, the task is to determine the most efficient and effective means to treat the risk. Insurance may not be the most efficient and effective means to treat a risk of public liability, particularly where the insurance cannot be obtained, or is too expensive given the risk; or is too limited in its scope (for example, will not cover player to player injury or car park incidents). It may be more appropriate to self insure, not engage in activities which would allow the risk to arise (for example, remove all trampolines from the sports hall or cease operations) or to transfer the risk to a skilled professional who is better able to bear the risk efficiently and effectively.

³⁹ Community Care Public Liability Cover for Not-For-Profit Organisations, underwritten by QBE Insurance. (Australia) Limited, Insurance Australia Limited and Allianz Australia Insurance Limited, clauses 3.13, 3.19 and 3.20.

⁴⁰ Clause 25.

⁴¹ DM Walker, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980 at p 627.

Second, the subsequent advice that the management committee must give members might also be actually misleading or at worst incorrect. If the management committee decides that there is 'no need' for public liability insurance, then it is required to

"advise the members that the failure to take out public liability insurance means that the association's assets would be at risk if there were a successful claim against the association."⁴²

The problem is that this is a 'one size fits all' provision and does not cater for situations where clearly the association's assets will **not** be placed at risk if there is a successful claim against the association.

Such situations arise where the association has engaged in risk management strategies that transfer the risk or the consequences of the risk to another entity. For example, the association may have an indemnity from another party for the liability. The Queensland government does this regularly itself in its grant agreements with sporting and community service organisations and leases of land to them. If the government is sued successfully, then it recovers the award from the funded body or lessee. Alternatively, the association may have engaged an expert professional manager to perform the risky activity which gives rise to the personal injury and seek compensation from this person for the successful claim. Again, the government does this on a daily basis when it employs consultants in all areas of government. In fact, so do businesses large and small.

Management committees will be faced with the prospect of being forced to advise members in terms of the legislation "that the failure to take out public liability insurance means that the association's assets would be at risk if there were a successful claim against the association" when they believe on good grounds that the statement is incorrect or at best misleading.

If the members do not agree with the actions of the management committee on not taking out public liability insurance, then it is not as simple as passing a resolution in a general meeting directing the management committee to do so. Section 60(1) of the Act gives the management committee control of the business and operations of the incorporated association and the member's only remedy is to elect a new management committee that will do their bidding or leave the association.

The management committee must also ensure that:

- intending members; and
- intending management committee members

are notified of whether the association has public liability insurance and the amount of the insurance.

The wording of the Bill appears to require that this notice has to be given to an intending member after the application form has been submitted to the incorporated association, but before the application is considered by the management committee. Although the intending member only need be 'advised' and this could be achieved verbally, probably for the sake of certainty and an audit trail, the advice will probably be given by written notice in person. It may be that some associations will decide that registered post or verifiable personal service is necessary, further adding to the compliance costs of this provision on associations.

While it could be argued that there are reasons why an intending member should be alerted to the public liability insurance arrangements, the same cannot be said for elected management committee members. To be elected as a management committee member one has to be a member of the association according to the Act. An intending management committee member should have already received such notice if he or she is also a new member and if they were an existing member, they would have received details as required in

42 Clause 25

the management committee report to the AGM. Again this provision adds an extra regulatory burden for little gain for the association, the public, the members or the government.

Further, any person or entity with whom the association may have dealings, and which could be expected to have an interest in knowing whether or not the association has public liability insurance, is to be advised if the association does not have public liability insurance. The Explanatory Notes to the Bill do not explain who exactly such persons or entities are that may have dealings with the associations. It merely repeats the words of the proposed amendment.

The Bill uses the words 'may have dealings'. This is probably different and wider than those that *actually* have dealings with the association. Further, the management committee has to decide whether the person 'could be expected to have an interest in knowing whether or not the association has public liability insurance'. Apart from actually asking the person concerned or conducting evidence based surveys of a population of such persons, it is perplexing as to how one would identify such a person with any degree of certainty that could be used to defend the matter if it ever arose in litigation. Most management committees are likely to err on the side of caution, resulting in an excessive compliance burden.

The issue also arises of how one goes about 'advising' such a person as discussed above. If the principles of contract law with respect to notices in unwritten contracts apply then questions about the visibility, timing, previous contact with the association and nature of the notice are considered.⁴³ If the negligence concepts of proximity and foreseeability are engaged, a higher level of attention to the advice might be required. The negligence concepts were developed in the cases of local authorities being sued for failing to warn bathers by public signs of the danger of diving into the sea.⁴⁴

Perhaps the duty could be discharged by:

- prominent signs at all physical structures where activities are carried on by the Association; and/or
- notice on all official documents of the incorporated association (including E-mails and web sites); and/or
- a signed acknowledgement before any dealings with a person commence.

It could be argued that as a matter of commonsense, management committees can act on the plain words of the provisions. This is an attractive argument, but in many associations volunteers will take the least risk and over comply with the section incurring more needless compliance costs for the association. In such a situation, a management committee may simply rethink the issue and decide to obtain public liability insurance in any case.

If the insurance is unavailable the association can wind up and either cease operations or take on another less 'insurance' restrictive corporate form. This raises the issue of why other corporate forms that the State has jurisdiction over do not have similar provisions such as incorporated associations, co operatives, letters patent or private act trust incorporations in order to protect members and the general public. Further why does the government itself or business not have the same requirements? The probably unintended implication arises, that those community members who volunteer to assist the Queensland community through being management committee members are less capable of managing their affairs than business or government.

In summary, there are features of the provision that appear overly paternalistic and politically expedient in allowing associations to operate without public liability insurance while at the same time practically compelling most associations to continue to take out the insurance regardless of whether it is actually needed or if it is the most efficient and effective form of risk management. A preferable solution to public liability issues lays in risk management, in prevention of incidents in a cost effective and efficient manner, not a 'one size fits all band aid' type of insurance. Insurance does not prevent the event, it deals with the consequences. In

43 *Causar v Browne* [1952] VLR 1.

44 *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

any case, insurance as specified in the Bill may be so limited as to not cover the incident or the insurer may not be able to meet the claim due to its offshore location or insolvency. The Government has not required other nonprofit legal entities to operate under the same insurance provisions. The thrust of the policy can be easily avoided by the use of other association controlled property holding entities. The provision also stifles innovation of nonprofit associations in finding alternatives to public liability insurance such as specified capped insurance, self insurance and mutual insurance pools which are becoming increasingly common in the United States and United Kingdom.⁴⁵

The new provision in respect of insurance will apply immediately to all associations except those that have an AGM within three months after the commencement of the Act.⁴⁶ For such associations, compliance with the provisions is not required until the second AGM after commencement of the Act. A month is measured in time at the beginning of the day in the particular calendar month and ending immediately before the beginning of the next named month. If there is no corresponding day (e.g. 31 January to ? February), then at the end of the month (e.g. 28 February).⁴⁷

Association Rules, Meetings and Forms

The Bill makes a number of clarifications to provisions where there was some doubt as to their interpretation or application has arisen over time. These clarifications are welcome.

The AIA Act overrides an association's inconsistent rules

A significant clarification is that where the rules of an association are inconsistent with the Act, the Act will prevail to the extent of the inconsistency.⁴⁸ While this probably was the case prior to the amendments, it will now be put beyond doubt. The Explanatory Notes to the Bill give an example of the operation of the new provision, which is:

“For example, Schedule 3 of the *Associations Incorporation Regulation 1999* requires the rules of an association to prescribe the quorum size for a general meeting, and such rules may be inconsistent with the minimum quorums for general meetings prescribed in the new Section 57A.”⁴⁹

Special Resolution on Incorporation

The resolution required to incorporate an association will no longer be referred to as a ‘special resolution’, but will be a ‘resolution passed at a meeting of the association by the votes of at least 3/4 of the association’s members who are present and entitled to vote on the resolution’.⁵⁰ It appears to differ from a special resolution under the current Act’s section 3 in the specification of the notice to be given to members.

Teleconferencing

The legality of teleconferencing of member and management committee meetings is confirmed. Any technology that allows a member to hear and take part in the discussions as they happen will be permitted.⁵¹ It further notes that the member so participating is regarded as present at a meeting although they be physically remote. This is important for special

⁴⁵ Z/Yen Limited. Risk Management Club for the VCS- feasibility. Management summary. Z/Yen: 2003.

⁴⁶ Clause 37

⁴⁷ Act Interpretation Act 1954, s 36.

⁴⁸ Clause 4

⁴⁹ *Explanatory Notes to Associations Incorporation and Other Legislation Amendment Bill 2006*, p6.

⁵⁰ Clause 6

⁵¹ Clause 15 & 21

resolutions where the votes counted are 'those present and entitled to vote'. Unfortunately the Bill does not clarify the long running confusion over whether a member has to be physically present in person to vote in management committee elections or whether proxies are permitted.

Quorum

The quorum required to hold a general meeting is reduced to the number of committee members as at the last general meeting plus one.⁵² However, if all the members of the association are also all the members of the committee, then the quorum is the total number less one. This provides a sensible solution for small associations where all the members are also all committee members. A decision made at any meeting without a quorum has no effect.

Inspection of documents

A member may submit a request to the association's secretary to be able to inspect and be given copies of the general meeting minute book.⁵³ The secretary must comply with the request within 28 days after the request is made. The member may be required to pay the reasonable costs of such inspection and copying.

The days are calculated by excluding the day of the actual request and counting 28 days with the copying or inspection to occur by the close of the following day.⁵⁴ If this day is not a business day, then the next following business day.

A similar provision is also proposed for a member inspecting the association's 'financial documents'.⁵⁵ A financial document is defined as including:

- income and expenditure;
- assets and liabilities;
- mortgages, charges and securities;
- the audit report, including statement of the auditor; and
- the statement of the association's president or treasurer.⁵⁶

It is also possible for a member to inspect such financial information from the records kept by the Office of Fair Trading.

Documents and non-English language

Most associations file their forms or rules to the Office of Fair Trading in the English language. However, if a document is filed in a language other than English, then a translation must be included in the filing.⁵⁷ This translation must be certified by a translator as correct. If there is any inconsistency between the two documents, the English translation prevails.

If the rules of an incorporated association are not in English, then the association secretary is required to provide a member on request with a certified English translation, unless the member indicates that no translation is required.⁵⁸

52 Clause 17

53 Clause 17

54 Acts Interpretation Act 1954 s 38.

55 Clause 18

56 Clause 5

57 Clause 33

58 Clause 54

The name of the association must also be in English characters.⁵⁹ Incorporated associations whose name is not in English characters will have three months after the next AGM to remedy the situation and comply with the Act.⁶⁰

Association's name on documents

The Act is further clarified in respect of the name of the association appearing on documents endorsed or issued by the association by virtue of section 32. Some have argued that it is the organisation's name not the 'registered name' of the association that is required. The provision will be amended to include the word 'registered' before 'name' to put this matter beyond doubt.⁶¹

Management Committee

Under section 59 of the current Act all the management committee members (not just the treasurer) are directly responsible for the preparation of the financial reports and audit of the association. The Bill now also makes the secretary, president and treasurer liable if the financial documents are not properly presented to the AGM.

The members of the management committee must ensure that the association has an address where documents can be formally served on the association.⁶² This has taken the place of the redundant 'registered office' under the present Act which will be removed. An incorporated association's registered office address will on the proclamation of the Act be the association's nominated address for service of documents.⁶³

A definition of casual vacancy of a management committee position is added to the Act by the Bill and is expressed to be "a vacancy that happens when an elected member of the management committee resigns, dies or otherwise stops holding office."⁶⁴

The Secretary

Voting and management committee membership

A person may become a Secretary of an incorporated association as:

- a member or even non-member appointed by the management committee to the position;
- a management committee member who is appointed to the position by the management committee; or
- a member elected by the members at the AGM.

It was unclear under the Act whether a secretary, if appointed, was a member of the management committee and entitled to vote. This situation has now been clarified by the Bill which states that a secretary:

- who is elected by the members at the general meeting is a member of the management committee;

59 Clause 12

60 Clause 37

61 Clause 13

62 Clause 10

63 Clause 37

64 Clause 19

- who is a management committee member and who is appointed by the management committee to be secretary is a member of the management committee; but
- a secretary who is merely appointed by the management committee, is not a member of the management committee.⁶⁵

The Act clearly gives power to the management committee to remove a secretary, however elected or appointed, at any time. If the management committee removes a secretary who is a member of the management committee formerly appointed by the management committee, then the person still remains a management committee member.

Specified functions

The secretary's functions are also further specified. These include:

- calling all meetings and preparing notices and agendas in consultation with the president;
- keeping the minutes of meetings;
- maintaining the register of members; and
- keeping copies of all correspondence "and other documents relating to the association."⁶⁶

This last point may depart from previous practice where the treasurer might have been responsible for financial documents. This provision will assist in internal dispute situations where members other than the Secretary attempt to call meetings without due procedure and prepare agendas without consultation or where the secretary calls a meeting without consultation.

Inspection of records by members and the public

Clause 11 of the current Model Rules of Schedule 4 of the Act requires the secretary to allow inspection by members of the register and its contents. The members' register which is maintained by the secretary will not, according to the Bill, be used by any person for the purpose of advertising or commercial purposes.⁶⁷ This will prevent the list of members being used for direct mail purposes without the permission of the association.

Further, an association or a member of an association may request that the Office of Fair Trading withhold information about the association from the public, in the event there could be a risk of harm to a member or the association. This may be appropriate in situations where the association operates a refuge or a member is the subject of a domestic violence order. There appears to be no ability for the association to prevent another member seeking the same information from its records if it adopts the current model rules. An association would require its "own rules" and to provide a mechanism to instruct the secretary not to allow inspection by another member of a particular member's register details. Consideration might be given by the Office of Fair Trading in any amendment of the regulations to provide such a mechanism in a new version of the model rules.

⁶⁵ Clause 22

⁶⁶ Clause 24

⁶⁷ Clause 9

Office of Fair Trading's Powers

The Office of Fair Trading's powers to refuse incorporation to an association where they do not believe that the proposed rules are in accordance with the Act have been specifically stated.⁶⁸

The Office can, when dealing with a complaint about a possible contravention of the Act, require a person who is or was on the management committee or an auditor to produce documents in their control.⁶⁹ This gives the Office significant investigatory powers.

Failure to comply with the reporting requirements will constitute grounds for cancellation of the registration of the association. Associations that are late with their annual returns are likely to find themselves with cancelled incorporation and this may have serious consequences.⁷⁰ Notices to be served by the Office of Fair Trading will no longer need not to be sent by 'registered post' and ordinary mail will suffice. While this will cut costs for the Office of Fair Trading and reduce the number of returned notices, it also means that an important notice such as cancellation of incorporation may go astray. Associations need to pay particular attention to their address for service notified to the Office of Fair Trading and check their mail regularly to avoid such serious consequences.

Commencement and Transition

- The Act will commence on a date fixed by proclamation and probably be accompanied by consequential amendments to the Regulations to the Act.⁷¹ The Office of Fair Trading may also take the opportunity to review the regulations to the Act including a new set of model rules. The new model rules will only apply to newly incorporated associations or those who specifically pass a special resolution to adopt the new form of model rules. It is disappointing and inconvenient that the Bill will not take up the suggestion of automatic rule updating of all associations which have model rules.
- An incorporated association's registered office address will on the proclamation of the Act be the association's nominated address for service of documents.⁷²
- Incorporated associations whose name is not in English characters will have three months after their next AGM to remedy the situation and comply with the Act.⁷³
- The new provision in respect of insurance will apply immediately to all associations except those that have an AGM within three months after the commencement of the Act.⁷⁴ For such associations, compliance with the provisions is not required until the second AGM after commencement of the Act. A month is measured in time at the beginning of the day in the particular calendar month and ending immediately before the beginning of the next named month. If there is no corresponding day (e.g. 31 January to ? February) then at the end of the month (e.g. 28 February).⁷⁵
- The new audit provisions will only apply to associations if the association's financial year end occurs after the commencement of the Act.⁷⁶ For example if the new amendments commence on the 1 July 2007 and the association's year end is 30 June 2007, then the new audit provisions will apply in the next financial period (1 July 2007 – 30 June 2008). A person approved by the Office of Fair Trading to audit an

68 Clause 7

69 Clause 29

70 Clause 27

71 Clause 2

72 Clause 37

73 Clause 37

74 Clause 37

75 Act Interpretation Act 1954, s 36.

76 Clause 37

incorporated association, even though they do not hold a qualification specified in the Act, will continue to hold that approval once the new provisions commence.⁷⁷

Unfinished Reforms

Not all of the matters identified in the review are dealt with in the Bill and the Minister indicated in the second reading speech that another Bill is being progressed.⁷⁸ It is hoped that this process is expedited given the length of the current reform process. The two part reform process will also mean an extended period for association management committees, members and administrators to come to understand the reforms and transition processes.

The Explanatory Notes to the Bill indicate the following issues will be the subject of the second Bill:

- (1) eligibility for incorporation - issues arise in determining whether associations are genuinely established for nonprofit purposes;
- (2) types of associations - the changing profile of associations means those with significant financial turnover require increased monitoring and regulation beyond the scope of the current Act;
- (3) dispute resolution - associations and their members often experience difficulty in resolving internal disputes (Resolving issues in the Supreme Court which has currently has the jurisdiction to deal with such disputes is expensive and impractical);
- (4) conflicts of interest – issues arise with committee members voting on contracts which benefit them directly.⁷⁹

The issues which were raised in the community consultation which have yet to be addressed include:

- transfer of associations to a company structure
- automatic adoption of revised Model Rules
- specification of management committee duties
- insolvent trading provisions and reform of winding up provisions
- procedures for signing cheques
- voting by minors
- criminal history provisions for committee member elections
- issuing of debentures
- vesting or property in trustees
- electronic filing of documents with the OFT
- OFT fee structure revision
- penalties under the act revision
- proactive educational role for OFT and OFT statements of policy

Some of the more significant issues are the:

- provision for an administrator in case of potential insolvency;
- automatic adoption of model rules to the latest available;
- mandatory dispute mediation procedures to be implied into all association rules; and

⁷⁷ Clause 37

⁷⁸ Hon MM Keech, Hansard, Queensland, 28 November, 2006, p 621

⁷⁹ Explanatory Notes, Associations Incorporation and Other Legislation Amendment Bill 2006, p 2.

- transfer of member's internal dispute resolution from the Supreme Court to the Magistrate's Court or a suitable tribunal; and
- migration of associations to the Corporations Act regime.

One issue that the influential Clubs Queensland has raised with the Government immediately prior to the last election was the mooted forced migration of large incorporated associations to the *Corporations Act 2001* as companies limited by guarantee. The Community Consultation Review suggested that the Minister should have power to direct large incorporated associations to transfer to a more appropriate regulatory regime. The Government before the last election responded to Clubs Queensland in the following terms about whether their large members would be affected, the Deputy Premier stating that:

“Although the Government has not completed the review of the AIA, it is not proposed that any club currently registered under the AIA would be forced to register under the Corporations Act. However, while the review of the AIA is ongoing the Government will continue to monitor whether the AIA remains an appropriate vehicle of incorporation for large clubs, which given the size of their undertakings may be more appropriately registered and regulated under the Corporations Act regime.”⁸⁰

⁸⁰ Letter from the Deputy Premier to Acting Chief Executive Officer, Clubs Queensland dated 6 September, 2006 and available at <<http://www.clubsqld.com.au/www/index.cfm?itemid=413#Election>>